UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

IN RE:	)	
	)	
HEARTLAND MEMORIAL HOSPITAL, LLC and Robert Handler,	)	CASE NO. 07-20188 JPK
	)	Chapter 11
Debtor.	)	
**********		
DAVID ABRAMS, not individually but solely as the Liquidating Trustee and court-appointed manager of Heartland Memorial Hospital, LLC,	)	
	)	
Plaintiff,	)	
	)	
v.	)	ADVERSARY NO. 09-2068
	)	
HAROLD E. COLLINS, KAREN BRIGGS, MARK EFRUSY, VIJAY GUPTA, RAMON HALUM, ALLEN HILL, HILTON HUDSON, PAUL JONES, JOHN KNIAZ, SHAUN KONDAMURI, RANDALL C. MORGAN, JR., JAGDISH PATEL, VIJAY PATEL, DAVID RAY, ALFRED SHARP, JEFFREY YESSENOW, WRIGHT CAPITAL PARTNERS, LLC, and LEROY J. WRIGHT	)	
	)	
Defendants.	)	

ORDER CONCERNING PLAINTIFF'S MOTION FOR LEAVE TO FILE SECOND AMENDED COMPLAINT

This order concerns the Motion for Leave to File Second Amended Complaint ["Motion"] filed on May 27, 2010 (record #104), and the objections of Harold E. Collins, Vijay Gupta, Shaun Kondamuri, Randall C. Morgan, Jagdish Patel, and David Ray to the Motion.

In entering this order, the court provisionally determines that actions asserted by the plaintiff David Abrams, as Liquidating Trustee, ["Abrams"] are not within the court's "core proceedings" jurisdiction as provided for by 28 U.S.C. § 157(b), but rather constitute "proceedings . . . related to a case under title 11" under 28 U.S.C. § 157(a). The court's jurisdiction is thus defined as that imparted in "related to" proceedings. Pursuant to 28 U.S.C. § 1334(b), 28 U.S.C. § 157(a), and N.D.Ind.L.R. 200.1(a)(1), this court has jurisdiction to fully

administer "related to" proceedings to the fullest extent provided for by 28 U.S.C. § 157(c)(1). The parties in this case have not consented to this court's exercise of final judgment authority in this adversary proceeding. However, the court determines that ruling on the Motion does not constitute a final order or judgment within the restrictions provided for by 28 U.S.C. § 157(c)(1), and that the court has complete jurisdiction to enter an order determining the Motion itself, and that the procedure provided for by that statute for submission of proposed findings of fact and conclusions of law to the district court is not applicable with respect to final determination of the Motion.

I. CASE HISTORY

This adversary proceeding was initiated by a complaint filed by Abrams on February 28, 2009. The caption of the complaint was as stated in the caption of this order.

On September 24, 2009, Abrams filed a Motion for Leave to File Amended Complaint (record #14), which was granted by the court's order entered on October 15, 2009 (record #16).[1] The amended complaint was filed on October 22, 2009 (record #18).

Following the initial preliminary pre-trial conference in the adversary proceeding, the court entered an order on May 26, 2010 (record #103) which provided that Abrams would file a motion for leave to file a second amended complaint by May 28, 2010, and that by June 11, 2010 any party desiring to do so was to file an objection to that motion.[2] Abrams filed the

[1] At the time that motion was filed, no defendant had filed an answer or other response to the complaint, and thus technically no leave of court was required for the amended complaint pursuant to Fed.R.Bankr.P. 7015/Fed.R.Civ.P. 15(a)(1).

[2] That order evidenced the agreement of all of the parties appearing at the initial preliminary pre-trial conference that Counts III through and including X of the amended complaint then before the court were within the court's jurisdiction provided for by 28 U.S.C. § 157(b)(1); that all parties agreed that Counts I and II of the amended complaint were within the court's "related to" jurisdiction provided for by 28 U.S.C. § 157(c)(1), with the exception that defendants represented by Attorney Morgan and the defendant Harold E. Collins did not concede any jurisdiction of the court with respect to actions asserted against them; and that issues concerning parties' consent to the court's exercise of final judgment jurisdiction with

Motion which is the subject of this order on May 27, 2010 (record #104). On June 11, 2010, the defendant Harold E. Collins ["Collins"] filed his Collins' Response to Plaintiff's Motion for Leave to File Second Amended Complaint (record #111). On June 18, 2010, the defendants Gupta, Kondamuri, Morgan, Patel and Ray filed a joint objection to the Motion entitled "Certain Defendants' Objection to Plaintiff's Motion to File Second Amended Complaint" (record #115).[3]

By order entered on October 27, 2010 (record #129), the court scheduled oral arguments on the Motion, and provided Abrams with an opportunity to file a response to the objections which had been filed with respect to the Motion. Abrams timely filed a response (record #135).

As the foregoing establishes, the defendants Collins, Gupta, Kondamuri, Patel, Ray and Morgan were the only parties who filed a separate motion to dismiss with respect to the first amended complaint, and those parties are the sole parties who object to the Motion.

It is important to note the material similarities and differences among the original

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respect to Counts I and II as stated in the amended complaint would remain for future determination.

[3] On June 21, 2010, Collins filed a document entitled "Collins Supplement to First Amended Motion To Dismiss, Response To Plaintiff's Motion For Order Authorizing Issuance Of, And Extending The Time To Serve, Alias Summonses, And Response To Plaintiff's Motion For Leave To File Second Amended Complaint" (record #117). This document was outside the scope of the court's orders regarding filing of responses to the Motion, and was not within the time frame for the filing of responses provided by the record #103 order. The court will not consider this filing in relation to determination of the Motion. Similarly, as provided for by the court's order entered on April 22, 2011 (record #159), the court will not consider materials sought to be submitted by Collins pursuant to his motion filed on February 4, 2011 (record #154).

It must also be noted that pursuant to the court's order entered on May 26, 2010 (record #103), briefing schedules and further proceedings with respect to motions to dismiss the amended complaint which had previously been filed were suspended, pending further order of the court. These motions to dismiss were record #47, filed by the defendants Gupta, Kondamuri, Patel and Ray; the record #77 amended motion to dismiss filed by the defendants Gupta, Kondamuri, Patel, Ray and Morgan; and the amended motion to dismiss filed by Collins as record #107. These motions will obviously be rendered moot if the court grants the Motion of Abrams to file a second amended complaint.

complaint, the first amended complaint, and the proposed second amended complaint in relation to the parties objecting to the Motion.

A. Original Complaint

1. The original complaint included Collins, Gupta, Kondamuri, Morgan, Jagdish Patel and Ray as defendants in the caption of the complaint.

2. Paragraph 23 of the original complaint states:

> 23. Defendant, Shaun Kondamuri, M.D., is an individual and he resides at 1943 Redwood Lane, Munster, Indiana 46321.

3. Paragraph 27 of the original complaint states:

> 27. Defendant, David Ray, D.P.M., is an individual and can be reached at 2001 US Highway 41, Suite J, Schererville, Indiana 46375.

4. Paragraph 39 of the original complaint states:

> 39. From 2004 until approximately October of 2005, Heartland's business affairs were managed by the directors of iHealthcare through a management committee for Heartland, comprised of Vijay Gupta, M.D., Harold B. Collins, Karen Briggs, D.O., Mark Efrusy, D.O., Ramon Halum, M.D., John Kniaz, D.O., David Ray, D.P.M., Jagdish Patel, M.D., Vijay Patel, M.D., Shaun Kondamuri, M.D., Randall Morgan, Jr., M.D., Jeffrey Yessenow, M.D., and Thomas McDermott, Sr. (hereinafter, collectively referred as the "Old Management").

5. The title of Count I of the original complaint is the following:

> Liquidating Trustee's Breach of Fiduciary Duty and Self-Dealing Claims Against Collins, Briggs, Efrusy, Gupta, Halum, Morgan, J. Patel, V. Patel and Yessenow

6. There is no mention of Kondamuri or Ray in any rhetorical paragraph in Count I of the original complaint.

7. Paragraphs 104 and 105 of the original complaint stated:

> 104. Collins, Briggs, Efrusy, Gupta, Halum, Morgan, J. Patel, V. Patel and Yessenow all owed fiduciary duties of care and loyalty to Heartland and, due to Heartland's insolvency (at all relevant times), to Heartland's employees, creditors and other vendors.

105. As more fully alleged above, Collins, Briggs, Efrusy, Gupta, Halum, Morgan, J. Patel, V. Patel and Yessenow all breached their fiduciary duties and acted in their own self interest by causing, without limitation, the transfer of the Munster hospital facility, making lease payments on the Munster hospital, permitting New Management, though Wright, Sharp and Hill to assume control of Heartland, failure to properly supervise New Management, allowing Heartland to make payments to Wright Capital Group, and allowing New Management to enter into detrimental transactions including, without limitation, the AIC transaction, and allowing the proceeds of the AIC transaction to be paid to Collins, Briggs, Efrusy, Gupta, Halum, Morgan, J. Patel, V. Patel and Yessenow.

B. First Amended Complaint

1. The first amended complaint included Collins, Gupta, Kondamuri, Morgan, Jagdish Patel and Ray as defendants in the caption of the complaint.

2. Paragraph 23 of the first amended complaint states:

23. Defendant, Shaun Kondamuri, M.D., is an individual and he resides at 1943 Redwood Lane, Munster, Indiana 46321.

3. Paragraph 27 of the first amended complaint states:

27. Defendant, David Ray, D.P.M., is an individual and can be reached at 2001 US Highway 41, Suite J, Schererville, Indiana 46375.

4. Paragraph 39 of the first amended complaint states:

39. From 2004 until approximately October of 2005, Heartland's business affairs were managed by the directors of iHealthcare through a management committee for Heartland, comprised of Vijay Gupta, M.D., Harold B. Collins, Karen Briggs, D.O., Mark Efrusy, D.O., Ramon Halum, M.D., John Kniaz, D.O., David Ray, D.P.M., Jagdish Patel, M.D. ("J. Patel"), Vijay Patel, M.D. ("V. Patel"), Shaun Kondamuri, M.D., Randall Morgan, Jr., M.D., Jeffrey Yessenow, M.D., and Thomas McDermott, Sr. (hereinafter, collectively referred as the "Old Management").

5. Paragraph 99 of the first amended complaint states:

99. Heartland received a disproportionately small portion of the proceeds from the SSFHS Sale/Leaseback transaction due to New Management's decisions regarding the allocation of the

purchase price between Heartland and Munster Holdings.[4]

6. The title of Count I of the first amended complaint is the following:

> Liquidating Trustee's Breach of Fiduciary Duty Claims Against Collins, Briggs, Efrusy, Gupta, Halum, Morgan, J. Patel, V. Patel and Yessenow

7. The body of Count I does not mention either Kondamuri or Ray.

8. Paragraphs 103 and 104 of the first amended complaint stated:

> 103. Collins, Briggs, Efrusy, Gupta, Halum, Morgan, J. Patel, V. Patel and Yessenow all owed fiduciary duties of care and loyalty to Heartland and, due to Heartland's insolvency (at all relevant times), to Heartland's employees, creditors and other vendors.
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> 104. As more fully alleged above, Collins, Briggs, Efrusy, Gupta, Halum, Morgan, J. Patel, V. Patel and Yessenow all breached their fiduciary duties by committing, without limitation, numerous acts of financial mismanagement, including inter alia, the transfer of the Munster hospital facility, making lease payments on the Munster hospital, permitting New Management, though Wright, Sharp and Hill to assume control of Heartland, failure to properly supervise New Management, allowing Heartland to make payments to Wright Capital Group, and allowing New Management to enter into detrimental transactions including, without limitation, the AIC transaction, and allowing the proceeds of the AIC transaction to be paid to Collins, Briggs, Efrusy, Gupta, Halum, Morgan, J. Patel, V. Patel and Yessenow.

C. Proposed Second Amended Complaint

1. The defendants designated in the caption of the second amended complaint are the same defendants as designated in the captions of the original complaint and of the first amended complaint.

2. Paragraph 23 of the second amended complaint states:

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[4] This paragraph is in contrast to paragraph 100 of the original complaint, which stated:

> 100. Heartland received a disproportionately small portion of the proceeds from the SSFHS Sale/Leaseback transaction due to the decision regarding the allocation of the purchase price between Heartland and Munster Holdings.

The difference between the two complaints is the addition of the term "New Management's".

23. Defendant, Shaun Kondamuri, M.D., is an individual and he resides at 1943 Redwood Lane, Munster, Indiana 46321.

3. Paragraph 27 of the second amended complaint states:

27. Defendant, David Ray, D.P.M., is an individual and can be reached at 2001 US Highway 41, Suite J, Schererville, Indiana 46375.

4. Paragraph 39 of the second amended complaint states:

39. From 2004 until approximately October of 2005, Heartland's business affairs were managed by the directors of iHealthcare through a management committee for Heartland, comprised of Vijay Gupta, M.D., Harold B. Collins, Karen Briggs, D.O., Mark Efrusy, D.O., Ramon Halum, M.D., John Kniaz, D.O., David Ray, D.P.M., Jagdish Patel, M.D., Vijay Patel, M.D., Shaun Kondamuri, M.D., Randall Morgan, Jr., M.D., Jeffrey Yessenow, M.D., and Thomas McDermott, Sr. (hereinafter, collectively referred as the "Old Management").

5. Paragraph 100 of the second amended complaint states:

100. Heartland received a disproportionately small portion of the proceeds from the SSFHS Sale/Leaseback transaction due to the decision regarding the allocation of the purchase price between Heartland and Munster Holdings.

6. The title of Count I of the second amended complaint states:

Liquidating Trustee's Breach of Fiduciary Duty and Self-Dealing Claims Against Heartland's Directors and Officers including Collins, Briggs, Efrusy, Gupta, Halum, Morgan, J. Patel, V. Patel, Ray and Yessenow

7. Paragraphs 104 and 105, and 106 of the second amended complaint state:

104. Collins, Briggs, Efrusy, Gupta, Halum**, Kondamuri**, Morgan, J. Patel, V. Patel**, Ray** and Yessenow ~~all~~**were directors and officers of Heartland and** owed fiduciary duties of care and loyalty to Heartland and, due to Heartland's insolvency (at all relevant times), to Heartland's employees, creditors and other vendors.

105. As more fully alleged above, Collins, Briggs, Efrusy, Gupta, Halum**, Kondamuri**, Morgan, J. Patel, V. Patel**, Ray** and Yessenow all breached their fiduciary duties and acted in their own self interest by causing, without limitation, the transfer of the Munster hospital facility, making lease payments on the Munster

hospital, permitting New Management, though Wright, Sharp and Hill to assume control of Heartland, failure to properly supervise New Management, allowing Heartland to make payments to Wright Capital Group, and allowing New Management to enter into detrimental transactions including, without limitation, the AIC transaction, and allowing the proceeds of the AIC transaction to be paid to Collins, Briggs, Efrusy, Gupta, Halum, Morgan, J. Patel, V. Patel and Yessenow.

106. The acts committed, and the fiduciary duties breached, by Collins, Briggs, Efrusy, Gupta, Halum**, Kondamuri**, Morgan, J. Patel, V. Patel**, Ray** and Yessenow proximately caused damages to Heartland, and its employees, creditors and other vendors.

8. The prayer for relief in Count I states:

A. **Enter a monetary** judgment~~:A. In~~ **in** favor of the ~~Liquidation~~**Liquidating** Trustee and against Collins, Briggs, Efrusy, Gupta, Halum**, Kondamuri,** Morgan, J. Patel, V. Patel ~~and Yessenow~~**, Ray and Yessenow, jointly and severally, in an amount to compensate the Heartland bankruptcy estate, its employees, creditors and other vendors for the damages they caused;**

From the foregoing, it can be seen that the second amended complaint differs from the original complaint and the first amended complaint in relation to the objectants, as follows:

a. The title of Count I of the second amended complaint specifically designates Kondamuri and Ray.

b. Count I of the second amended complaint specifically asserts actions against Kondamuri and Ray, whereas the prior two complaints did not mention either of those defendants in the body of Count I.

c. In the second amended complaint, Count I specifically asserts that the defendants named in that count were “all directors and officers of Heartland”, while the original two complaints did not include this specific assertion.

II. ANALYSIS

As the foregoing recitation establishes, while the original complaint and the first amended complaint designated Kondamuri and Ray as defendants in the caption, and included rhetorical paragraphs identifying them as defendants, no specific action was asserted against them anywhere in either of the complaints. The second amended complaint retained the first two complaints' general assertions as to Kondamuri and Ray, and then added them as specifically designated defendants in Count I with respect to the claims asserted in that count. Additionally, in the second amended complaint, Count I specifically states that the defendants were directors and officers of Heartland Memorial Hospital, LLC. In the first two complaints, there is no such specific assertion.

The specific issue before the court is whether or not leave to file an amended complaint should be granted pursuant to Fed.R.Bankr.P. 7015, which incorporates the provisions of Fed.R.Civ.P. 15(a)(2) into adversary proceeding matters. This rule states:

> **(a) Amendments Before Trial.**
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> . . .
>
> (2) ***Other Amendments***. In all other cases, a party may amend its pleading only with the opposing party's written consent or the court's leave. The court should freely give leave when justice so requires.

Abrams asserts essentially that the failure to specifically designate the defendants Kondamuri and Ray in Count I of the original two complaints was the result of a "scrivener's error", and that the addition of these defendants as specifically designated in Count I is within the scope of permissible complaint amendment under Rule 15(a)(2). In response, the defendants Gupta, Kondamuri, Patel, Ray and Morgan assert that the addition of these defendants will not give rise to a sustainable action against these two because the complaint will be deemed to not "relate back" pursuant to Fed.R.Bankr.P. 7015/Fed.R.Civ.P. 15(c); that Count I changes the theory of the case against the defendants designated in it, again in a manner which will allow that amended complaint in that context to be dismissed based upon

statute of limitations arguments because it will not relate back to the date of filing of the original complaint; and that the amended complaint will be subject to a Fed.R.Bankr.P. 7012(b)/ Fed.R.Civ.P. 12(b)(6) motion to dismiss for the same reasons upon which those defendants' motion to dismiss the first amended complaint was premised. In his objection, Collins states a number of matters which the court deems to be immaterial to the issues raised by the Motion. The most pertinent contention advanced by Collins is that Count I in the second amended complaint essentially changes the theory of action against the defendants named in that count as being breach of fiduciary duties owed by them as directors of Heartland Memorial Hospital, LLC, as contrasted to assertions in the prior two complaints that the action in Count I was apparently premised upon their breach of fiduciary duties as managers of Heartland Memorial Hospital, LLC as derivative of their position as directors in iHealthcare.[5]

Let's resolve one thing first. The objections of all the objectants in part assert that the second amended complaint will be subject to a Rule 12(b)(6) motion to dismiss, upon the bases which they asserted in their respective motions to dismiss the first amended complaint. The Motion presents to the court the issue of whether or not leave should be granted to file a second amended complaint, not whether the second amended complaint should be dismissed for failure to state a claim. Suffice it to say that the objecting defendants' motions to dismiss do not raise issues that are so obviously sustainable that the filing of the second amended complaint would constitute a futile undertaking.

More conceptually difficult to deal with are the assertions of Abrams, and of the objecting defendants, with respect to "relation back" of amendments made by the second

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[5] Collins also asserts matters in relation to the addition of Kondamuri and Ray as defendants. However, these additions do not affect Collins, who has always been designated as a defendant in Count I, and he has no standing to raise these issues with respect to his own objection to the filing of the second amended complaint. The same can be said for Gupta's, Morgan's and Patel's objections to the proposed addition of Ray and Kondamuri as defendants.

amended complaint to the time of filing of the original complaint. The objectants' contentions are essentially that new parties have been added by the second amended complaint (Kondamuri and Ray), and that a new cause of action has been asserted in Count I of the second amended complaint. Following up on this assertion, Kondamuri and Ray assert that any action now sought to be asserted against them in Count I, absent relation back, will be barred by applicable statutes of limitation, and all of the objectants assert that any new theory advanced by Count I of the second amended complaint will also be time barred as well.

After the briefing was closed in this case, the United States Court of Appeals for the Seventh Circuit issued its decision in *Joseph v. Elan Motorsports Technologies Racing Corp*., 638 F.3d 555, *r'hrng denied* March 31, 2011 (7th Cir. 2011). In that case, the plaintiff filed a motion for leave to file an amended complaint to change the designated defendant from Elan Corp. (the originally designated defendant) to Elan Inc., and from the facts stated in the decision, it appears that the plaintiff himself raised the issue of relation back of the amendment under Rule 15(c). As will be seen from the recitation of the decision entered in *Elan* by the Seventh Circuit which follows, it is clear that the issue of leave to amend under Rule 15(a)(2) is entirely separate from the issue of relation back under Rule 15(c). However, in this case the plaintiff and all of the objecting defendants have presented the court with arguments concerning the application of Rule 15(c) to the Motion, and the court will address that issue in addition to the Rule 15(a)(2) issue. Because *Elan* is so incredibly on point, the court will state most of that decision in this order, as follows:

> Elan Corp., the named defendant, filed an answer, and pretrial discovery ensued. Eventually Wardrop (who at some point in this protracted litigation went bankrupt and was succeeded as plaintiff by his trustee in bankruptcy, another detail we can ignore) discovered that his contract was indeed with Elan Inc. and not Elan Corp. He sought leave to amend the complaint to change the defendant to Elan Inc. with relation back to the date of the original complaint, the statute of limitations having meanwhile expired. Relation back is permitted in several circumstances,

including when "the party to be brought in by amendment: (I) received such notice of the action that it will not be prejudiced in defending on the merits; and (ii) knew or should have known that the action would have been brought against it, but for a mistake concerning the proper **party's** identity." Fed.R.Civ.P. 15(c)(1)(C). A **party** who is on notice long before the statute of limitations expires that he is an intended defendant, and who suffers no harm from the failure to have been **named** as a **defendant** at the outset, is in the same position as a defendant sued within the statute of limitations. The public policy expressed in a statute of limitations is therefore not undermined by relation back in the circumstances specified in the federal rule. See *Dixon Ticonderoga Co. v. Estate of O'Connor,* 248 F.3d 151, 168 (3d Cir.2001).

Another situation in which relation back is permitted is where the law of the jurisdiction that creates the applicable statute of limitations, which in this case is Indiana, permits relation back. Fed.R.Civ.P. 15(c)(1)(A); Committee Note to 1991 Amendment; *Arendt v. Vetta Sports, Inc.,* 99 F.3d 231, 236 and n. 3 (7th Cir.1996). But Indiana's relation-back rule, Ind. Trial R. 15(C), is materially identical to the federal rule, so we need not consider it separately.

The district judge ruled that the proposed amended complaint did not relate back. He quoted from our decision in *Hall v. Norfolk Southern Ry.,* 469 F.3d 590, 596 (7th Cir.2006), that "it is the plaintiff's responsibility to determine the proper party to sue and to do so before the statute of limitations expires." A failure to identify the proper party is a mistake not about the defendant's name but about who is liable for the plaintiff's injury. Wardrop didn't think that Elan Inc. was liable to him and thus called Elan Inc. Elan Corp. by mistake because of the similarity of the names; he thought Elan Corp. was liable to him for breach of contract, not realizing—as he should have done, because it was stated in his written contract—that actually Elan Inc. was the other party to the contract. The judge thought that since the amended complaint did not (in his view) relate back to the date of the original filing, permitting the amendment would be futile. And since Wardrop acknowledged that Elan Corp.—the only defendant named in the original complaint—was not liable to him, the judge concluded that there was no controversy between the parties, and so he dismissed the suit, just as he would have done had it been abandoned by the plaintiff, or settled.

Even if the refusal to allow relation back had been correct (it wasn't, as we're about to see), the dismissal of the suit on the ground that the parties had no controversy would have been incorrect. **Rule 15(c) is about relation back of amendments; it**

is not about whether to permit an amendment, which is the subject of Rules 15(a) and (b). Rule 15(a)(2), which governs amendments to pleadings before trial (and there hasn't been a trial in this case, despite its age), allowed Wardrop to amend his complaint with the district court's leave; the rule adds that "the court should freely give leave when justice so requires." **Amending the complaint to substitute the alleged contract breaker for the innocent affiliate was entirely proper; whether the amendment would relate back to the date when the original complaint was filed and thus defeat the defense of statute of limitations was a separate question.** See *Arthur v. Maersk, Inc.,* 434 F.3d 196, 202–04 (3d Cir.2006); *United States v. Hicks,* 283 F.3d 380, 386–87 (D.C.Cir.2002); cf. *Jones v. Bernanke,* 557 F.3d 670, 674–75 (D.C.Cir.2009). The judge should have allowed the amendment and then, believing that the amended complaint did not relate back, should have rendered judgment on the merits for both defendants—for Elan Corp., the original defendant, because it had not broken any contract with Wardrop, and for Elan Inc., added as a defendant by the amendment, because the statute of limitations for a suit against it based on the contract had expired.

It is more common, though slightly irregular, for a district court simply to "deny leave to amend based wholly or partially on [the court's] belief that any amendment would not relate back." *Slayton v. American Express Co.,* 460 F.3d 215, 226 n. 11 (2d Cir.2006); see also *Hall v. Norfolk Southern Ry.,* 469 F.3d 590, 592 (7th Cir.2006); *Woods v. Indiana University–Purdue University,* 996 F.2d 880, 882 (7th Cir.1993). That is what the judge did here, but he should have followed it up by entering judgment for the original defendant on the merits, on the ground that it wasn't liable to the plaintiff. The judge's method of disposing of the case—dismissing for want of jurisdiction—set the stage for counsel for Elan Corp. to make the ridiculous argument that we have no jurisdiction because Elan Inc. is not a party and Wardrop does not claim to have any rights against Elan Corp. The logic of the argument is that the denial of a motion to amend a complaint to substitute a potentially liable entity for the defendant named in the complaint is not reviewable by an appellate court because the plaintiff is no longer seeking a judgment against the only defendant named in the complaint.

Inconsistently with his insistence that Elan Inc. is not a party, counsel for Elan Corp. defends the judge's ruling denying leave to file an amended complaint with relation back even though the only beneficiary of the ruling is Elan Inc. He says that Elan Corp. "makes no argument on behalf of non-party [Elan Inc.]," and then proceeds to argue that the judge was right not to allow Elan Inc. to be added as a defendant, an argument relevant only to that firm.

Actually the judge was wrong about relation back, though it was a forced error because it was after he ruled on Wardrop's motion to amend the original complaint that the Supreme Court in *Krupski v. Costa Crociere S.p.A.,* ––U.S. ––––, 130 S.Ct. 2485, 177 L.Ed.2d 48 (2010), changed what we and other courts had understood, in *Hall* and the other cases we cited, to be the proper standard for deciding whether an amended complaint relates back to the date of the filing of the original complaint. We had thought the focus should be on what the plaintiff knew or should have known, and by that criterion Wardrop indeed had failed to make the case for relation back because he had intended to sue Elan Corp. even though the other party to his contract was Elan Inc. From early in the case, moreover, filings by Elan Corp.—including a corporate disclosure statement that showed it was a separate corporation from Elan Inc. (it was Elan Inc.'s parent, but the liability of a subsidiary is not automatically attributed to its parent even if it is wholly owned by it)—should have alerted Wardrop's lawyer to his mistake. It took him almost six years to discover it. His delay was inexcusable.

But the Supreme Court's decision in *Krupski,* hewing closely to the language of Rule 15(c)(1)(C), has cut the ground out from under the district court's decision. See also *United States ex rel. Miller v. Bill Harbert Int'l Construction, Inc.,* 608 F.3d 871, 885 (D.C.Cir.2010) (per curiam); *Abdell v. City of New York,* ––– F.Supp.2d ––––, ––––, 2010 WL 5422375, at *4–7 (S.D.N.Y. Dec. 22, 2010). **The only two inquiries that the district court is now permitted to make in deciding whether an amended complaint relates back to the date of the original one are, first, whether the defendant who is sought to be added by the amendment knew or should have known that the plaintiff, had it not been for a mistake, would have sued him instead or in addition to suing the named defendant; and second, whether, even if so, the delay in the plaintiff's discovering his mistake impaired the new defendant's ability to defend himself**. "A potential defendant who has not been named in a lawsuit by the time the statute of limitations has run is entitled to repose—unless it is or should be apparent to that person that he is the beneficiary of a mere slip of the pen, as it were." *Rendall–Speranza v. Nassim,* 107 F.3d 913, 918 (D.C.Cir.1997); see *Wood v. Worachek,* 618 F.2d 1225, 1230 (7th Cir.1980); *Locklear v. Bergman & Beving AB,* 457 F.3d 363, 366–67 (4th Cir.2006).

The fact that the plaintiff was careless in failing to discover his mistake is *relevant* to a defendant's claim of prejudice; the longer the delay in amending the complaint was, the likelier the new defendant is to have been placed at a disadvantage in the

litigation. **But carelessness is no longer a ground independent of prejudice for refusing to allow relation back.**

Elan Inc. knew that Wardrop meant to sue it rather than Elan Corp. He meant to sue the party to the employment contract with him and Elan Inc. was that party. The two corporations are pieces of a dizzying array of corporate entities all of which, it seems—or at least Elan Corp. and Elan Inc.—are managed out of the same office. Elan Inc. is registered in Delaware and has an address and a registered agent in Delaware, as required of a Delaware corporation. But its operations are conducted from the same office in Georgia that houses Elan Corp. Wardrop traveled to that office many times during and in relation to the performance of his contract. His complaint was served on the employee of still another affiliate—but, as it happened, that was the person who "supervised, directed, and monitored" Wardrop's services under his contract with Elan Inc. The person was a de facto employee of Elan Inc. when supervising Wardrop's performance of his contract with that firm. But however we characterize his legal relation to Elan Inc., he had to know, as soon as he received the complaint, that Wardrop meant to sue Elan Inc. rather than Elan Corp.—knew that had it not been for the plaintiff's error, to which the confusing similarity of the corporate names doubtless contributed, Elan Inc. would have been named as the defendant. See *United States ex rel. Miller v. Bill Harbert Int'l Construction, Inc., supra,* 608 F.3d at 883–84; *Singletary v. Pennsylvania Dep't of Corrections,* 266 F.3d 186, 195–98 (3d Cir.2001); *Datskow v. Teledyne, Inc.,* 899 F.2d 1298, 1301–02 (2d Cir.1990); 16 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 1499, pp. 146–51 (2d ed. 1996). His knowledge was Elan Inc.'s knowledge because he was, as we said, supervising that firm's contract with Wardrop.

Thus one of the two requirements for relation back was satisfied (knowledge by the "real" defendant); but so we think was the other requirement (prejudice), even though the district judge made no finding on whether Elan Inc. was harmed by the delay in Wardrop's moving to substitute it as a defendant. Prejudice manufactured by a defendant is not a ground for refusing relation back. Cf. *Hafferman v. Westinghouse Electric Corp.,* 653 F.Supp. 423, 429 (D.D.C.1986); *Hart v. Bechtel Corp.,* 90 F.R.D. 104, 106 (D.Ariz.1981); *Wasson v. McClintock,* 703 A.2d 726, 730 (Pa.Commonwealth Ct.1997). It's like failing to mitigate damages. As soon as the employee we mentioned read Wardrop's complaint, he knew, and therefore Elan Inc. knew, that Wardrop had sued the wrong entity. Elan Inc. sat on its haunches for almost six years while the litigation ground forward, and it would still be squatting on its haunches had Wardrop not finally woken up in 2009 and moved to substitute it as defendant. No prejudice

accrued to Elan Inc. in the brief interval between the filing of Wardrop's original complaint and the receipt of the complaint by the employee who had administered Wardrop's contract. Elan Inc., if it had promptly disabused Wardrop of his mistake and he had amended his complaint forthwith, would have suffered no harm from delay in the amending of the complaint because there wouldn't have been any delay. It brought on itself any harm it has suffered from delay, and can't be allowed to gain an advantage from doing that.

So the decision of the district court must be reversed with directions to allow the amended complaint, substituting Elan Inc. as defendant with relation back to the date of the original complaint.

The amended complaint differs from the original complaint in other respects as well as the defendant's name, however, and on remand the district judge will have to consider whether those differences warrant rejection of the amended complaint, as Elan Inc. argues. **Granted, the fact that the amended complaint adds new legal theories (as distinct from new claims, *Doe v. Howe Military School,* 227 F.3d 981, 989–90 (7th Cir.2000); *R.P. ex rel. C.P. v. Prescott Unified School District,* 631 F.3d 1117, 1124 (9th Cir.2011) (the *R.P.* opinion refers to "a new theory of relief" but it is apparent that the intended meaning is a new claim)) would not warrant rejection. *Santamarina v. Sears, Roebuck & Co.,* 466 F.3d 570, 573–74 (7th Cir.2006); *McBeth v. Himes,* 598 F.3d 708, 716 (10th Cir.2010); *Hall v. Spencer County,* 583 F.3d 930, 934–35 (6th Cir.2009). A complaint need not plead legal theories. *Hatmaker v. Memorial Medical Center,* 619 F.3d 741, 743 (7th Cir.2010); *O'Grady v. Village of Libertyville,* 304 F.3d 719, 723 (7th Cir.2002); *Sagana v. Tenorio,* 384 F.3d 731, 736–37 (9th Cir.2004)**. The defendant can elicit them by contention interrogatories. Fed.R.Civ.P. 33(a)(1); *In re Ocwen Loan Servicing, LLC Mortgage Servicing Litigation,* 491 F.3d 638, 641 (7th Cir.2007); *American Nurses' Ass'n v. Illinois,* 783 F.2d 716, 723 (7th Cir.1986); *Starcher v. Correctional Medical Systems, Inc.,* 144 F.3d 418, 421 and n. 2 (6th Cir.1998).

But there is a new claim in the amended complaint: a claim of quantum meruit, which might allow an award of damages based on the market value of the services that Wardrop rendered to Elan Inc. even if he failed to prove a breach of contract, if he rendered those services with a reasonable expectation of being compensated for them. *Wallace v. Long,* 105 Ind. 522, 5 N.E. 666, 668–69 (1886); *Mueller v. Karns,* 873 N.E.2d 652, 659 (Ind.App.2007); *Lindquist Ford, Inc. v. Middleton Motors, Inc.,* 557

> F.3d 469, 477–78 (7th Cir.2009); *ConFold Pacific, Inc. v. Polaris Industries, Inc.,* 433 F.3d 952, 958 (7th Cir.2006); Jason Scott Johnston, "Communication and Courtship: Cheap Talk Economics and the Law of Contract Formation," 85 *Va. L.Rev.* 385, 486 (1999). Proof of such damages is likely to require expert evidence of market value, *Overseas Development Disc Corp. v. Sangamo Construction Co.,* 686 F.2d 498, 508–09 (7th Cir.1982); see, e.g., *Dresser Industries, Inc. v. Gradall Co.,* 965 F.2d 1442, 1448 (7th Cir.1992) (per curiam); *Ensley v. Cody Resources, Inc.,* 171 F.3d 315, 318, 322 (5th Cir.1999), and it's pretty late in this litigation to be trotting out new experts. But this and any other issues relating to the proposed amended complaint, other than the unexceptionable substitution of the right Elan for the wrong Elan, are for the district judge to consider in the first instance. (emphasis supplied). *Elan, supra.*

As the foregoing notes, the standard for reviewing relation back under Rule 15(c) has now been delineated by the United States Supreme Court in a manner which most courts had not previously adopted. This new standard for review of relation back was stated in *Krupski v. Costa Crociere S.p.A.*, 130 S.Ct. 2485, 2493-2496 (2010), as follows:

> The Court of Appeals first decided that Krupski either knew or should have known of the proper party's identity and thus determined that she had made a deliberate choice instead of a mistake in not naming Costa Crociere as a party in her original pleading. 330 Fed. Appx., at 895. By focusing on Krupski's knowledge, the Court of Appeals chose the wrong starting point. The question under Rule 15(c)(1)(C)(ii) is not whether Krupski knew or should have known the identity of Costa Crociere as the proper defendant, **but whether Costa Crociere knew or should have known that it would have been named as a defendant but for an error**. Rule 15(c)(1)(C)(ii) asks what the prospective *defendant* knew or should have known during the Rule 4(m) period, not what the *plaintiff* knew or should have known at the time of filing her original complaint.[FN3]
>
> > FN3. Rule 15(c)(1)(C) speaks generally of an amendment to a "pleading" that changes "the party against whom a claim is asserted," and it therefore is not limited to the circumstance of a plaintiff filing an amended complaint seeking to bring in a new defendant. Nevertheless, because the latter is the "typical case" of Rule 15(c)(1)(C)'s applicability, see 3 Moore's Federal Practice § 15.19[2] (3d ed.2009), we use this circumstance as a shorthand throughout this opinion. See also *id.,* § 15.19[3][a]; Advisory Committee's 1966 Notes on Fed.

Rule Civ. Proc. 15, 28 U.S.C.App., pp. 122-123
(hereinafter Advisory Committee's 1966 Notes).

Information in the plaintiff's possession is relevant only if it bears on the defendant's understanding of whether the plaintiff made a mistake regarding the proper party's identity. For purposes of that inquiry, it would be error to conflate knowledge of a party's existence with the absence of mistake. A mistake is "[a]n error, misconception, or misunderstanding; an erroneous belief." Black's Law Dictionary 1092 (9th ed.2009); see also Webster's Third New International Dictionary 1446 (2002) (defining "mistake" as "a misunderstanding of the meaning or implication of something"; "a wrong action or statement proceeding from faulty judgment, inadequate knowledge, or inattention"; "an erroneous belief"; or "a state of mind not in accordance with the facts"). That a plaintiff knows of a party's existence does not preclude her from making a mistake with respect to that party's identity. A plaintiff may know that a prospective defendant-call him party A-exists, while erroneously believing him to have the status of party B. Similarly, a plaintiff may know generally what party A does while misunderstanding the roles that party A and party B played in the "conduct, transaction, or occurrence" giving rise to her claim. If the plaintiff sues party B instead of party A under these circumstances, she has made a "mistake concerning the proper party's identity" notwithstanding her knowledge of the existence of both parties. **The only question under Rule 15(c)(1)(C)(ii), then, is whether party A knew or should have known that, absent some mistake, the action would have been brought against him**.

Respondent urges that the key issue under Rule 15(c)(1)(C)(ii) is whether the plaintiff made a deliberate choice to sue one party over another. Brief for Respondent 11-16. We agree that making a deliberate choice to sue one party instead of another while fully understanding the factual and legal differences between the two parties is the antithesis of making a mistake concerning the proper party's identity. We disagree, however, with respondent's position that any time a plaintiff is aware of the existence of two parties and chooses to sue the wrong one, the proper defendant could reasonably believe that the plaintiff made no mistake. The reasonableness of the mistake is not itself at issue. As noted, a plaintiff might know that the prospective defendant exists but nonetheless harbor a misunderstanding about his status or role in the events giving rise to the claim at issue, and she may mistakenly choose to sue a different defendant based on that misimpression. That kind of deliberate but mistaken choice does not foreclose a finding that Rule 15(c)(1)(C)(ii) has been satisfied.

This reading is consistent with the purpose of relation back: to

balance the interests of the defendant protected by the statute of limitations with the preference expressed in the Federal Rules of Civil Procedure in general, and Rule 15 in particular, for resolving disputes on their merits. See, *e.g.,* Advisory Committee's 1966 Notes 122; 3 Moore's Federal Practice §§ 15.02[1], 15.19[3][a] (3d ed.2009). A prospective defendant who legitimately believed that the limitations period had passed without any attempt to sue him has a strong interest in repose. But repose would be a windfall for a prospective defendant who understood, or who should have understood, that he escaped suit during the limitations period only because the plaintiff misunderstood a crucial fact about his identity. Because a plaintiff's knowledge of the existence of a party does not foreclose the possibility that she has made a mistake of identity about which that party should have been aware, such knowledge does not support that party's interest in repose.

Our reading is also consistent with the history of Rule 15(c)(1)(C). That provision was added in 1966 to respond to a recurring problem in suits against the Federal Government, particularly in the Social Security context. Advisory Committee's 1966 Notes 122. Individuals who had filed timely lawsuits challenging the administrative denial of benefits often failed to name the party identified in the statute as the proper defendant-the current Secretary of what was then the Department of Health, Education, and Welfare-and named instead the United States; the Department of Health, Education, and Welfare itself; the nonexistent "Federal Security Administration"; or a Secretary who had recently retired from office. *Ibid.* By the time the plaintiffs discovered their mistakes, the statute of limitations in many cases had expired, and the district courts denied the plaintiffs leave to amend on the ground that the amended complaints would not relate back. Rule 15(c) was therefore "amplified to provide a general solution" to this problem. *Ibid.* It is conceivable that the Social Security litigants knew or reasonably should have known the identity of the proper defendant either because of documents in their administrative cases or by dint of the statute setting forth the filing requirements. See 42 U.S.C. § 405(g) (1958 ed., Supp. III). Nonetheless, the Advisory Committee clearly meant their filings to qualify as mistakes under the Rule.

. . .

B

The Court of Appeals offered a second reason why Krupski's amended complaint did not relate back: Krupski had unduly delayed in seeking to file, and in eventually filing, an amended complaint. 330 Fed.Appx., at 895. **The Court of Appeals offered no support for its view that a plaintiff's dilatory conduct can justify the denial of relation back under Rule 15(c)(1)(C), and**

we find none. The Rule plainly sets forth an exclusive list of requirements for relation back, and the amending party's diligence is not among them. Moreover, the Rule mandates relation back once the Rule's requirements are satisfied; it does not leave the decision whether to grant relation back to the district court's equitable discretion. See Rule 15(c)(1) ("An amendment ... *relates back* ... when" the three listed requirements are met (emphasis added)).

The mandatory nature of the inquiry for relation back under Rule 15(c) is particularly striking in contrast to the inquiry under Rule 15(a), which sets forth the circumstances in which a party may amend its pleading before trial. By its terms, Rule 15(a) gives discretion to the district court in deciding whether to grant a motion to amend a pleading to add a party or a claim. Following an initial period after filing a pleading during which a party may amend once "as a matter of course," a party may amend its pleading only with the opposing party's written consent or the court's leave," which the court "should freely give ... when justice so requires." Rules 15(a)(1)-(2). We have previously explained that a court may consider a movant's "undue delay" or "dilatory motive" in deciding whether to grant leave to amend under Rule 15(a). *Foman v. Davis,* 371 U.S. 178, 182, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962). As the contrast between Rule 15(a) and Rule 15(c) makes clear, however, the speed with which a plaintiff moves to amend her complaint or files an amended complaint after obtaining leave to do so has no bearing on whether the amended complaint relates back. Cf. 6A C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 1498, pp. 142-143, and nn. 49-50 (2d ed.1990 and Supp.2010).

Rule 15(c)(1)(C) does permit a court to examine a plaintiff's conduct during the Rule 4(m) period, but not in the way or for the purpose respondent or the Court of Appeals suggests. As we have explained, the question under Rule 15(c)(1)(C)(ii) is what the prospective defendant reasonably should have understood about the plaintiff's intent in filing the original complaint against the first defendant. To the extent the plaintiff's postfiling conduct informs the prospective defendant's understanding of whether the plaintiff initially made a "mistake concerning the proper party's identity," a court may consider the conduct. Cf. *Leonard v. Parry,* 219 F.3d 25, 29 (C.A.1 2000) ("[P]ost-filing events occasionally can shed light on the plaintiff's state of mind at an earlier time" and "can inform *a defendant's* reasonable beliefs concerning whether her omission from the original complaint represented a mistake (as opposed to a conscious choice)"). The plaintiff's postfiling conduct is otherwise immaterial to the question whether an amended complaint relates back.[FN5]

> FN5. Similarly, we reject respondent's suggestion that Rule 15(c) requires a plaintiff to move to amend her complaint or to file and serve an amended complaint within the Rule 4(m) period. Rule 15(c)(1)(C)(I) simply requires that the prospective defendant has received sufficient "notice of the action" within the Rule 4(m) period that he will not be prejudiced in defending the case on the merits. The Advisory Committee Notes to the 1966 Amendment clarify that "the notice need not be formal." Advisory Committee's 1966 Notes 122.
> (emphasis supplied)

Putting the two foregoing recent cases together, the court derives that the inquiry under Rule 15(a)(2) is still separate from that under Rule 15(c), but that the two may be interrelated and somewhat concurrently addressed if the record invites doing so. The principal focus of Rule 15(c) is prejudice to a defendant, premised essentially upon a consideration of whether a defendant should have realized that he, she or it was an intended defendant but for a mistake of some kind made in pleading a case. Additionally, considerations under Fed.R.Civ.P. 4(m) do not form an independent basis for determination of relation back under Rule 15(c), but again, the focus is prejudice suffered by a defendant. Finally, as stated in *Elan*, a complaint is not required to plead legal theories, but it is required to plead claims: the concept of adding a "claim" to an amended complaint is thus distinct from the concept of adding a legal theory of recovery or clarifying or modifying a legal theory previously stated.

Let's examine the second amended complaint under the foregoing principles.

First, analysis under Fed.R.Civ.P. 15(a)(2) is appropriate. Those standards were stated in *Soltys v. Costello*, 520 F.3d 737, 743 (7th Cir. 2008) as follows:

> We review the district court's denial of a motion for leave to amend a complaint under the highly deferential abuse of discretion standard. *Trustmark Ins. Co. v. Gen. & Cologne Life Re of Am.,* 424 F.3d 542, 553 (7th Cir.2005). "[T]he decision to grant or deny a motion to file an amended pleading is a matter purely within the sound discretion of the district court." *Brunt v. Serv. Employees Int'l Union,* 284 F.3d 715, 720 (7th Cir.2002). We will overturn a denial of a motion for leave to amend a complaint only if the district court "abused its discretion by

> refusing to grant the leave without any justifying reason." *Id.; see also J.D. Marshall Int'l Inc. v. Redstart, Inc.,* 935 F.2d 815, 819 (7th Cir.1991).
>
> Federal Rule of Civil Procedure 15(a) provides that if a party is not entitled to amend a pleading as a matter of course, it may amend "with the opposing party's written consent or the court's leave." The court "should freely give leave when justice so requires." Fed.R.Civ.P. 15(a)(2). "Although the rule reflects a liberal attitude towards the amendment of pleadings, courts in their sound discretion may deny a proposed amendment if the moving party has unduly delayed in filing the motion, if the opposing party would suffer undue prejudice, or if the pleading is futile." *Campania Mgmt. Co. v. Rooks, Pitts & Poust,* 290 F.3d 843, 848-49 (7th Cir.2002). Delay on its own is usually not reason enough for a court to deny a motion to amend. *Dubicz v. Commonwealth Edison Co.,* 377 F.3d 787, 792-93 (7th Cir.2004); *Perrian v. O'Grady,* 958 F.2d 192, 194 (7th Cir.1992). But " 'the longer the delay, the greater the presumption against granting leave to amend.' " *King v. Cooke,* 26 F.3d 720, 723 (7th Cir.1994) (quoting *Tamari v. Bache & Co.,* 838 F.2d 904, 908 (7th Cir.1988)).

The standards were reiterated in the recent case of *Bausch v. Stryker Corporation*, 630 F.3d 546, 562 (7th Cir. 2010) as follows:

> As a general matter, Rule 15 ordinarily requires that leave to amend be granted at least once when there is a potentially curable problem with the complaint or other pleading. A plaintiff is entitled to amend the complaint once as a matter of right, Fed.R.Civ.P. 15(a), and a court should "freely give leave [for a party to file an amended complaint] when justice so requires." Fed.R.Civ.P. 15(a)(2). A district court may deny leave to file an amended complaint in the case of "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, [and] futility of amendment." *Airborne Beepers & Video, Inc. v. AT & T Mobility LLC,* 499 F.3d 663, 666 (7th Cir.2007), quoting *Foman v. Davis,* 371 U.S. 178, 182, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962). However, while a court may deny a motion for leave to file an amended complaint, such denials are disfavored. As we said in *Foster,* "[d]istrict courts routinely do not terminate a case at the same time that they grant a defendant's motion to dismiss; rather, they generally dismiss the plaintiff's complaint without prejudice and give the plaintiff at least one opportunity to amend her complaint." 545 F.3d at 584. Even if the Bausch court was correct in dismissing with prejudice under *James Cape & Sons Co. v. PCC Const. Co.,* 453 F.3d 396, 400–01 (7th Cir.2006)

> (affirming dismissal with prejudice where the losing plaintiff failed to request leave to amend until it was too late, and the district court had no way of knowing what the proposed amended complaint entailed), it was not correct in later refusing to vacate the judgment to provide Bausch leave to amend when, in the absence of undue delay or other fault on her part, Bausch submitted a revised complaint that was not futile.

The overriding standard is that amendment of complaints is favored, and leave to amend is to be freely granted.[6]

As delineated above, and as essentially stated by Abrams and by the objectants other than Collins, the elements for review of amendment under Rule 15(a)(2) are the following:

1. Has there been undue delay;

2. Is the amendment motivated by bad faith or dilatory motive on the part of the movant;

3. Has the plaintiff failed repeatedly to cure deficiencies by amendments previously allowed;

4. Is there undue prejudice to the defendants by allowing the amendment; and

5. Is the amendment futile.

The court determines that the proposed second amended complaint is not prompted in any manner by bad faith or dilatory motive on behalf of Abrams. The record establishes that there has not been a repeated failure to cure deficiencies by amendments previously allowed:

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[6] Moreover, in response to the objectants' arguments that the second amended complaint is subject to dismissal under Rule 12(b)(6) to the same extent which they assert would be true with respect to the first amended complaint, *Bausch* makes clear that even if a complaint is dismissed for failure to state a claim, it is almost always the case that leave to file an amended complaint will be granted in response to that dismissal. This pronouncement clearly emphasizes the policy of the United States Court of Appeals for the Seventh Circuit that amendments to complaints are to be generously allowed, as contrasted to termination of an action by failing to allow them. Thus, while the court will not review the substance of the motions to dismiss filed by the objectants with respect to the first amended complaint, it is indeed possible that even if those motions were granted, the court would grant the plaintiff leave to file a second amended complaint in response to the grounds for dismissal of the first amended complaint.

one prior amended complaint does not "repeated failure" make. With respect to undue delay in relation to the second amended complaint, Abrams filed the Motion within a relatively short time frame after the filing of the objectants' respective motions to dismiss the first amended complaint, in an effort which Abrams asserts is intended to clarify mistakes made in the first amended complaint so that the action can more effectively proceed on the merits. Based upon the record before it, the court finds that the Motion does not involve undue delay by Abrams.

The focus of the inquiry under Rule 15(a)(2) thus boils down to prejudice suffered by the objectants by means of the proposed second amended complaint, and the futility of filing the second amended complaint. With respect to the latter concept, the objectants' arguments as to futility first assert that the second amended complaint will be subject to a Rule 12(b)(6) motion to dismiss to the same extent as is asserted with respect to the first amended complaint. As stated above, the court will not substantively determine the merits of any of these defendants' Rule 12(b)(6) motions, and were it to do so, it is possible that even if sustained, the court would allow Abrams to file an amended complaint, in accord with the standards of the United States Court of Appeals for the Seventh Circuit. On this basis, the court determines that the second amended complaint is not an exercise in futility.

Also under an assertion of futility, the defendants contend that the amendments sought to be made by the second amended complaint will not "relate back" to the time of filing of the original complaint, and thus that claims sought to be asserted against Kondamuri and Ray, and the basis for recovery asserted in Count I of the second amended complaint, will be barred by applicable statutes of limitation. First, the assertion of a bar by the statute of limitations is a designated affirmative defense under Fed.R.Bankr.P. 7008(a)/Fed.R.Civ.P. 8(c): whether or not the assertion by the objectants of a bar by means of applicable statutes of limitation is valid with respect to the proposed second amended complaint has yet to be determined and cannot be determined from the present record. Thus, in the context of futility of granting the Motion,

the premise that it is futile to allow the amendments due to a defense of the statute of limitations cannot be sustained.

That leaves us with the concept of prejudice to the defendants/objectants. As noted above, this element under Rule 15(a)(2) is related generally, and particularly in this case, to the concept of relation back of the second amended complaint under Rule 15(c)(1), which rule states:

> **(c) Relation Back of Amendments**.
>
> **(1)** ***When an Amendment Relates Back***. An amendment to a pleading relates back to the date of the original pleading when:
>
> > **(A)** the law that provides the applicable statute of limitations allows relation back;
> >
> > **(B)** the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out--or attempted to be set out--in the original pleading; or
> >
> > **(C)** the amendment changes the party or the naming of the party against whom a claim is asserted, if Rule 15(c)(1)(B) is satisfied and if, within the period provided by Rule 4(m) for serving the summons and complaint, the party to be brought in by amendment:
> >
> > > **(i)** received such notice of the action that it will not be prejudiced in defending on the merits; and
> > >
> > > **(ii)** knew or should have known that the action would have been brought against it, but for a mistake concerning the proper party's identity.

First, sub-paragraph 1(A) of Rule 15(c) does not apply in this case, or at least at this point cannot be determined to apply in this case, because of the immaturity of assertions at this time with relation to applicable statutes of limitation.

In relation to Rule 15(c)(1)(B), it is absolutely clear that the claim now sought to be asserted by the addition of Kondamuri and Ray as specifically designated defendants in Count I arises out of the conduct, transaction or occurrence alleged by both the original complaint and

the first amended complaint against the other defendants specifically designated in those two pleadings. Rule 15(c)(1)(B) has been satisfied. Thus, Rule 15(c)(1)(C) is the focus. Analysis shifts to the concept of notice and knowledge by Kondamuri and Ray, obtained by them within the 120-day period provided by Fed.R.Civ.P. 4(m), that they were intended to be designated as defendants,.

This is an extraordinarily interesting case in terms of the circumstances of the pleadings. The court has been unable to find any reported decision which precisely parallels these circumstances. Both the original and the first amended complaint designated Kondamuri and Ray as defendants in the caption of the case. Both the original and the first amended complaint contain specific averments (paragraph 23 as to Kondamuri and paragraph 27 as to Ray) which designated both of those individuals as defendants. Both the original and first amended complaint averred, in paragraph 39, that Kondamuri and Ray were involved in the management of Heartland Memorial Hospital, LLC. But then, until the second amended complaint, Count I did not specifically designate Kondamuri and Ray as defendants in that count, or in any other count in the complaint.

Putting aside issues of proper service of process upon them (which is the subject of another motion by Abrams, and objections to that motion by all of the objectants to this Motion), it is clear that Kondamuri and Ray knew as soon as any other defendant designated in this case that they were involved in this litigation. It is interesting to note that the motions to dismiss filed by Gupta, Kondamuri, Patel, Ray – and the amended motion filed by those individuals and by Morgan – begin in the very first line with the following: "Now come certain Defendants ('the Movants') . . . Shaun Kondamuri, M.D. . . . David Ray, D.P.M." The record discloses that Kondamuri and Ray have been actively involved in this litigation from an early stage. The record also establishes that no substantive proceedings have been undertaken in this litigation as yet, because of skirmishes over setting the stage through finalization of pleadings upon

which the case is based. Particularly, because of these skirmishes, no discovery has yet been formally pursued pursuant to order of the court. Based upon the fact that they were designated as defendants in the caption of this case from its inception, were specifically designated as defendants in rhetorical paragraphs which describe them as parties, and were specifically designated as individuals involved in actions which were the subject of Count I in the original and first amended complaints, the court determines that Kondamuri and Ray "knew or should have known" that the action was actually brought against them as well as the defendants specifically designated in Count I, but for a mistake concerning the omission of them from that count as designated defendants, thus satisfying the requirements of Fed.R.Civ.P.15(c)(1)(C)(ii). These individuals also received notice of the action at its initiating stage, and it is clear that they considered themselves as defendants by the filing of motions that sought to dismiss actions which may or may not have been specifically and clearly asserted against them by the first amended complaint. Based upon the record before it, the court finds that Kondamuri and Ray have not been prejudiced by the proposed second amended complaint, and that this lack of prejudice will cause the second amended complaint to "relate back" to them pursuant to the provisions of Fed.R.Civ.P. 15(c)(1).[7]

Finally, with respect to all of the objectants', including Collins', assertions that Count I in the second amended complaint asserts a claim not asserted in the first two pleadings because of their capacity in relation to Heartland Memorial Hospital, LLC specifically averred in the second amended complaint as contrasted to the first two pleadings, the court similarly finds that the Motion should be allowed pursuant to Rule 15(a)(2). As noted by *Elan, supra*., a complaint

[7] As a result of this order, these defendants can raise whatever defenses they want in response to the second amended complaint, or whatever grounds they choose to assert pursuant to Rule 12(b)(6) with respect to the second amended complaint. However, based upon the directives of *Elan*, *supra*., the court is determining in this order that the second amended complaint will relate back to the date of filing of the original complaint pursuant to Rule 15(c)(1).

is not required to plead legal theories, and based upon this premise, a change in legal theories – even if Count I of the second amended complaint were construed to implement such – does not involve the assertion of a new "claim". The base claim asserted in Count I is premised upon the defendants' actions in relation to Heartland Memorial Hospital, LLC, and that claim remains constant throughout all three pleadings. Thus, in relation to this argument by the objectants, Rule 15(c)(1)(B) and (C) are not implicated at all, and even if it were to be deemed that Count I of the second amended complaint asserts a "claim" rather than a mere change in theory, that claim satisfies the requirements of Rule 15(c)(1)(B) and (C).

Based upon the foregoing, the court determines that the Motion should be granted.

IT IS ORDERED as follows:

A. The Motion for Leave to File Second Amended Complaint filed by the plaintiff on May 27, 2010 is granted.

B. The plaintiff shall file the second amended complaint which was attached to the Motion within 21 days of the date of entry of this order, and serve that complaint upon all defendants in the manner required by applicable law.

C. Any answer or other response to the second amended complaint shall be filed within 28 days of the date of service of the second amended complaint upon a particular party.

Dated at Hammond, Indiana on June 9, 2011.

/s/ J. Philip Klingeberger
J. Philip Klingeberger, Judge
United States Bankruptcy Court

Distribution:
Attorneys of Record
All Defendants